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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections 309(j) and
337 of the Communications Act of 1934
as Amended

Promotion of Spectrum Efficient
Technologies on Certain Part 90
Frequencies

Establishment of Public Service Radio
Pool in the Private Mobile
Frequencies Below 800 MHZ

WT Docket No. 99-87

RM-9332

To: The Commission

**COMMENTS OF
RAY'S RADIO SHOP, INC.**

Ray's Radio Shop, Inc., by its attorneys, respectfully submits these comments in response to the *Notice of Proposed Rulemaking* ("NPRM") released by the Federal Communications Commission ("FCC" or "Commission") on March 25, 1999, in WT Docket No. 99-87.

In these comments, Ray's Radio Shop, Inc. points up the disadvantages that will be imposed upon small businesses if the Commission imposes competitive bidding as a method for licensing existing private land mobile radio service ("PLMRS") frequencies. Ray's Radio Shop, Inc. also discusses the reasons why auctions are not appropriate, from a legal standpoint, in the private services. Ray's Radio Shop, Inc. takes this opportunity, therefore, to urge the FCC to retain the existing licensing mechanism for the PLMRS frequencies.

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I. STATEMENT OF INTEREST

Ray's Radio Shop, Inc. is a small, family-owned business involved in the sales, servicing and operation of industrial and business radio systems in the Modesto, California area. In operating this business, Ray's Radio Shop, Inc.'s primary focus is to provide effective and reliable land mobile communications service at low cost for its industrial and business customers. The customers of Ray's Radio Shop, Inc. include farmers, waste disposal companies, trucking concerns, construction companies and similar users of PLMRS frequencies. These users all have one common concern — they each rely upon the private land mobile spectrum to conduct their daily operations, safeguard their employees and property, and improve the quality of the services they provide to the public.

II. BACKGROUND

In its *Notice of Proposed Rule Making* in the instant proceeding, the Commission requests comment on the effect of the spectrum auction provisions contained in the Balanced Budget Act of 1997 upon the licensing methods traditionally used in the Private Land Mobile Radio Services. The Commission notes that, when Congress originally approved the use of auctions for telecommunications services in 1993, “[t]he services deemed non-auctionable . . . were largely private and noncommercial offerings operating on a variety of frequency bands.”¹ Consistent with the text of the auctions authority, the radio services excluded from competitive

¹ *NPRM* at ¶ 10.

bidding were typically services that were not “subscriber-based.” The NPRM concludes that the 1997 Budget Act seems to have expanded the potential scope of the FCC’s auctions authority.

The NPRM observes that, as a result of the 1997 Act:

whether a particular service or class of frequencies is used principally for subscriber-based services is no longer dispositive. With the elimination of this criterion for determining auctionability of mutually exclusive applications, unless a service is expressly exempt from competitive bidding, the only remaining requirement for auctionability is that, subject to “our obligation in the public interest . . . to avoid mutual exclusivity in application and licensing proceedings,” there must be mutual exclusive applications accepted for licenses in that service.²

III. COMMENTS

A. In the Private Land Mobile Radio Services, Mutual Exclusivity Is Rare.

Under the statutory changes introduced in 1997, the presence of mutually exclusive applications is all that is required for a radio service to be subject to auctions. However, mutual exclusivity is hard to come by. Additionally, at least with respect to the existing private land mobile services, mutual exclusivity must be avoided if the public interest is best served by not auctioning particular spectrum. The Conference Report states that “[t]he conferees are particularly concerned that the Commission might interpret its expanded competitive bidding authority in a manner that minimizes its obligations under section 309(j)(6)(E), thus overlooking engineering solutions, negotiations, or other tools that avoid mutual exclusivity.”³

² NPRM at ¶ 25.

³ H.R. Conf. Rep. No. 105-217, 105th Cong., 1st Sess., at 572 (1997) (“Conference Report”).

B. There Are two Inviolable Truths Inherent In the 1997 Budget Act.

Two inviolable principles emerge from the 1997 Budget Act:

First, auctions are appropriate when there are mutually exclusive applications; and

Second, the Commission has an affirmative obligation to avoid fostering mutually exclusive applications.

Applying these principles to the Private Land Mobile Radio Services, it becomes clear that competitive bidding measures are inconsistent with the licensing mechanisms for PLMRS frequencies. One of the hallmarks of the private services is reliance on frequency coordination. The essential purpose of frequency coordination is to avoid electrical interference between radio systems. Typically, frequency coordination takes place before an application is filed with the Commission. Thus, by the time a PLMRS application has been filed at the FCC, measures have already been taken to avoid mutual exclusivity. The frequency coordination process, at its very essence, is an engineering solution, a tool to avoid mutual exclusivity.

The 1997 Budget Act has not changed the manner in which the PLMRS services and their allocated frequencies are licensed -- a manner that tends to avoid mutual exclusivity. With respect to the private services, the only significant change introduced by the 1997 Act is the emphasis on the Commission's duty to avoid mutual exclusivity, and by extrapolation, to avoid auctions. Unless the FCC changes its pre-existing licensing processes, those radio services, such as PLMRS, that were previously determined to be non-auctionable because of their licensing processes continue to be non-auctionable under the '97 Budget Act. For the Commission to

override its obligation to avoid mutual exclusivity in licensing, it must be of greater benefit to the public to attempt to raise money for the U.S. Treasury then to continue to license PLMRS by application. Ray's Radio Shop, Inc. firmly believes that the public interest is best served by maintaining the *status quo*.

C. Successful Operation of a Small Business Requires A Predictable and Stable Environment.

Ray's Radio Shop, Inc.'s customers tend to be small businesses that rely on radio communications to conduct day-to-day operations within the company or to service their customers. Their communication needs are well-served by site-based licensing, which can be supplemented as required and when required by additional application or license modification. The costs associated with PLMRS systems are relatively economical and they can be anticipated and factored into a small business's budget. If the Commission were to auction the previously non-auctionable PLMRS frequencies, small businesses will suffer. PLMRS applicants and licensees would be at the mercy of an auction schedule, which always includes a notice and comment period, and would only be able to guess at the cost of any given license, since it is impossible to know what the winning bid will be until an auction is concluded. Auctioned licenses will be less likely to accommodate the often unique coverage requirements of PLMRS licensees, and could result in spectrum waste. Such a result would be harmful to Ray's Radio Shop, Inc. and its customers and contrary to the public interest.

PLMRS systems are used for internal purposes. They are not necessarily configured and utilized within a pre-defined geographic area, and do not lend themselves to auctioning. A small business's inability to expand when it needs to, in a predictable and affordable manner, would disrupt the stability and predictability essential to the operations of small businesses. Such a result does not serve the public interest. Under the 1997 Budget Act, the PLMRS services remain non-auctionable and must continue to be licensed by site-specific applications rather than auctions.

D. The Band Manager Concept Is Not Useful For PLMRS Frequencies.

PLMRS users need to be able to access the frequencies they require for their business communications in a timely, affordable and reliable manner. The concept of using a Band Manager to parcel out spectrum to PLMRS users is fraught with both legal and practical difficulties. There would be no assurances and no guarantees that a Band Manager would be responsive to the public interest dictates inherent in the Communications Act. In every licensing decision that it renders, the Commission is bound by law to act in a way that promotes the public interest. Band Managers would necessarily be affected by a variety of motivations, both monetary and subjective. They would have a lesser ability, and far less motivation, to act in an objective manner. Ray's Radio Shop, Inc. is greatly concerned that Band Managers would elevate profit motives over the public interest standard.

If the Commission were to adopt the Band Manager concept, it would lose meaningful

control over the manner in which the radio spectrum, a public resource, is used. The Band Manager concept would invest one or more private companies, each having allegiance to shareholders or boards of directors, with the responsibility for managing a valuable public resource. Historically, users of the private radio spectrum have found that commercial telecommunications providers have been incapable of providing service that is responsive to the unique needs of private users for independent control, specialized operations and near instantaneous maintenance service. In many ways, Band Managers would be analogous to commercial service providers. Band Managers would not necessarily be responsive to the needs and unique requirements of individual private radio users. The profit motive — not the public interest — would necessarily influence the decisions reached and actions taken by Band Managers. For the private services, there is no substitute for vigilant application of the public interest standard. Until Congress directs it to do so, the Commission ought not to seek ways to privatize its functions. The FCC should, therefore, refrain from adopting the Band Manager concept.

IV. CONCLUSION

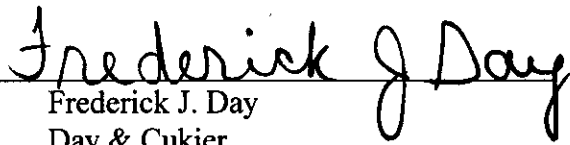
The frequency coordination process effectively prevents mutually exclusive applications. Under the 1997 Budget Act, if there is no mutual exclusivity, there can be no auctions. Therefore, unless the FCC changes the existing licensing mechanism for PLMRS frequencies, those services that were non-auctionable pursuant to the '93 Budget Act remain non-auctionable under the '97 Budget Act. For this reason and the other reasons stated above, Ray's Radio Shop,

Inc. does not believe that spectrum auctions are permissible in the PLMRS services.

Accordingly, Ray's Radio Shop, Inc. urges the Commission not to subject the PLMRS spectrum to competitive bidding. Ray's Radio Shop, Inc. also believes that the Band Manger concept is incompatible with the fundamental nature of the private services. The Band Manager mechanism should, likewise, not be implemented for the PLMRS frequencies.

Respectfully submitted,

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